

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

ALTERRA AMERICA INSURANCE COMPANY,

Index No. 652813/2012 **E**

Plaintiff,

-against-

**NOTICE OF MOTION TO
COMPEL PRODUCTION OF
UNDERLYING LITIGATION
AND SETTLEMENT
MATERIALS FROM
THE NATIONAL FOOTBALL
LEAGUE AND
NFL PROPERTIES LLC**

NATIONAL FOOTBALL LEAGUE AND NFL
PROPERTIES, LLC, et al.,

Defendants.

-----X

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Index No. 652933/2012 **E**

Plaintiffs,

-against-

NATIONAL FOOTBALL LEAGUE, NFL
PROPERTIES LLC., et al.,

Defendants.

-----X

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law in support of the Insurers'¹ Motion to Compel Production of Underlying Litigation and Settlement Materials from the National Football League and NFL Properties LLC (the "NFL Parties"), and the Affirmation of Christopher R. Carroll, Esq. and the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court via the court-appointed Special Referee, the Honorable Michael H. Dolinger (Ret.), at JAMS, located at 620 Eighth Avenue, 34th Floor, New York, New York 10018, for an Order pursuant to CPLR §§ 3124 and 3126, granting the Insurers' Motion to Compel Production of Underlying Litigation and Settlement Materials, and for such other further relief as this Court deems just, proper and equitable.

Dated: New York, New York
August 21, 2018

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO.,

Index No. 652813/2012 **E**

Plaintiff,

v.

Hon. Andrea Masley

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Index No. 652933/2012 **E**

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

**INSURERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL
PRODUCTION OF UNDERLYING LITIGATION AND SETTLEMENT MATERIALS**

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I. PRELIMINARY STATEMENT

The National Football League and NFL Properties LLC (collectively, the “NFL Parties”) seek insurance coverage from their Insurers¹ for an underlying settlement that will provide uncapped monetary benefits for the next 65 years to a class of over 20,000 former football players alleging long-term cognitive deficiencies relating to head impacts sustained during their NFL careers. At present, class counsel’s actuarial consultant projects that the settlement fund will pay out over \$1.4 billion. The NFL Parties also seek tens of millions of dollars in costs allegedly incurred in defending the underlying class action and pending opt-out lawsuits.

While certain Insurers participated in the defense of the NFL Parties in the underlying lawsuits, many did not consent to the NFL Parties’ settlement, and all Insurers broadly reserved their rights to challenge whether the settlement is covered under the policies. Despite their expectation that the Insurers pay hundreds of millions of dollars under the policies, and their duty to cooperate with the Insurers, the NFL Parties refuse to produce any underlying defense and settlement documents in discovery in this action (other than publicly-available materials) on the purported basis that they are either irrelevant or privileged. The NFL Parties’ position must be rejected under New York’s broad discovery standard and binding precedent rejecting such arguments by policyholders.

New York law requires disclosure of all information and documents that are “material and necessary” to the prosecution or defense of a lawsuit, a standard that is applied liberally. In

¹ The identified insurers are TIG Insurance Company, The North River Insurance Company, United States Fire Insurance Company, Discover Property & Casualty Insurance Company, St. Paul Protective Insurance Company, Travelers Casualty & Surety Company, Travelers Indemnity Company, Travelers Property Casualty Company of America, Continental Insurance Company, Continental Casualty Company, Bedivere Insurance Company, Allstate Insurance Company, ACE American Insurance Company, Century Indemnity Company, Indemnity Insurance Company of North America, California Union Insurance Company, Illinois Union Insurance Company, Westchester Fire Insurance Company, Federal Insurance Company, Great Northern Insurance Company, Vigilant Insurance Company, Munich Reinsurance America, Inc., XL Insurance America Inc., XL Select Insurance Company, American Guarantee and Liability Insurance Company, Arrowood Indemnity Company, and Westport Insurance Corporation.

February 2017, the Insurers served documents requests upon the NFL Parties seeking (among other things) all documents and communications relating to: (1) the NFL's analysis of the underlying plaintiffs' claims and the NFL Parties' defenses to those claims; (2) the NFL's valuation of the underlying claims; and (3) the negotiations of the underlying settlement. The NFL Parties have refused to produce any substantive information on these issues, despite the clear relevance and probative value of such documents.

The NFL Parties' document production, while voluminous in size, consists primarily of publicly-available documents. Indeed, the NFL Parties have "produced" *every* filing entered on the docket in the underlying action. The Insurers appreciate the NFL Parties' thoroughness in this regard, but it is the materials that the Insurers *cannot* access on their own—the underlying defense files generated and maintained by the NFL Parties and their common defense counsel at great expense to certain of the NFL Parties' insurers—that are at the heart of this motion.

Efforts to shield this type of relevant material by way of the attorney-client privilege and/or work product doctrine have been rejected by courts throughout the country. These privileges do not apply to underlying litigation materials when asserted by insureds against their own insurers in an insurance coverage action. This is due to the tripartite relationship that exists between an insurer, its insured, and defense counsel based upon their common interest in the defense and resolution of the underlying action. As numerous courts have concluded, insureds may not withhold underlying defense materials from their insurers which, as here, allegedly bear an obligation to pay a settlement.

In addition, even if certain of the documents sought by the Insurers did implicate a privilege, the NFL Parties have placed such documents "at issue" in this lawsuit by seeking what is likely to be over \$1 billion from the Insurers. The NFL Parties continue to withhold the

requested materials on the basis of privilege yet, at the same time, seek to prosecute claims for coverage against the Insurers based upon the alleged reasonableness of their defense efforts and the NFL Parties' decision to enter into an uncapped monetary settlement.

The NFL Parties even allege that certain Insurers have acted in bad faith by refusing to consent to the settlement. Despite making such a bold assertion, the NFL Parties claim privilege over all materials that would reflect defense counsel's (and the NFL Parties') assessment of the underlying claims and defenses, as well as the reasons for entering into the class settlement. The "at issue" doctrine operates for the express purpose of preventing this type of gamesmanship by a litigant. Although the NFL Parties place much emphasis on the federal court approval of the underlying settlement (in a forum to which the Insurers are not party), the fact that the settlement was approved by the federal courts under the applicable class action statutes is not a substitute for a determination, in this action, of whether the settlement was reasonable and otherwise covered under the Insurers' policies. Thus, the NFL Parties have placed the entire underlying defense file "at issue" and may not shield such unquestionably relevant documents from production to the Insurers.

Finally, the NFL Parties' concerns regarding production of the underlying defense and settlement documents are eliminated by the strict Stipulation and Order for the Production and Exchange of Confidential Information ("Protective Order") entered in this case. The parties engaged in extensive negotiations regarding this stipulation, agreeing to protections above and beyond the standard confidentiality order template. This Protective Order was designed to allow production of this exact type of information. For all of these reasons, the Insurers request that the Special Referee grant their motion to compel the underlying defense and settlement

documents from the NFL Parties so that the Insurers can meaningfully complete fact discovery and prepare this case for trial.

II. FACTUAL BACKGROUND

A. THE UNDERLYING LITIGATION

This insurance coverage dispute arises from underlying actions consolidated in a multi-district litigation captioned In Re National Football League Players' Concussion Injury Litigation, MDL 2323, in the United States District Court for the Eastern District of Pennsylvania before the Honorable Anita Brody (the "MDL Action"). The MDL Action includes thousands of claims brought by former NFL players and their families since July 2011 alleging certain neurological injuries and conditions that are alleged to be the result of concussive and subconcussive impacts sustained during their NFL careers. Several of the Insurers (certain primary insurers) have incurred millions of dollars in legal expenses for the NFL Parties' defense in the MDL Action, which is being provided by the firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), among other firms retained by the NFL. These expenses continue to accrue, and the NFL Parties continue to seek reimbursement.

After a mediation and settlement approval process, the District Court granted final approval of a class settlement in the MDL Action on May 8, 2015 (the "Settlement"). The Settlement encompasses funding by the NFL Parties² of: (1) a \$75 million Baseline Assessment Program regarding neurocognitive function to be made available to those former players who have not opted out of the class; (2) a \$10 million fund for brain injury research; (3) an *uncapped* Monetary Award Fund to compensate former players who have received or receive in the future certain "qualifying diagnoses" (including CTE, ALS, Parkinson's Disease, Alzheimer's Disease,

² The Settlement does not allocate liability between the two NFL Parties. Instead, it makes each jointly and severally liable for all Settlement obligations, including the uncapped Monetary Award Fund.

and certain forms of dementia) over the next 65 years; and (4) an attorneys' fee award of \$112.5 million. The total ultimate amount of funding the NFL Parties are obligated to pay under the Settlement is currently estimated to be in the range of \$1.4 billion. See Ex. A to Affirmation of Christopher R. Carroll ("Carroll Aff."). The NFL Parties' obligations with respect to the Settlement are not contingent upon the outcome of their pursuit of insurance coverage. All available objection procedures and appeals having been exhausted, including a denial of certification by the United States Supreme Court, and the Settlement is now final.³

As of August 20, 2018 (just one year into the Settlement's 65-year term), 20,503 class members have registered for the Settlement, and over \$521 million in monetary awards have been authorized. There are currently 94 "opt-out" claimants, consisting of 75 former NFL players and 19 family members. These opt-out lawsuits are subject to the NFL Parties' renewed motion to dismiss on labor law preemption grounds.

B. THE COVERAGE ACTION

1. Relevant Procedural Background

This lawsuit was filed in the Commercial Division of the Supreme Court of New York on August 13, 2012 (the "Coverage Action"). In what would prove to be the first of many efforts to avoid or delay progress of coverage litigation in their home state, the NFL Parties filed a competing coverage action two days later in the Superior Court of California. Ultimately, after a California appellate court affirmed that California was not an appropriate forum for this coverage dispute and the NFL Parties' motion to dismiss this case in favor of the California Action was denied, Justice Oing entered a Preliminary Conference Order on April 12, 2013, setting a

³ Notably, the Settlement was entered into and approved without a single page of discovery being exchanged and without disposition of any substantive motion. Thus, as discussed in more detail below, the NFL Parties' contention that the public record of the MDL Action constitutes documents sufficient to inform the Insurers regarding the claims asserted and the reasonableness of the Settlement is particularly absurd.

discovery schedule and instructing the parties to enter into a confidentiality agreement. See Ex. B to Carroll Aff.

Thereafter, through extensive meet and confer efforts, the parties entered into a confidentiality agreement that satisfied the NFL Parties' confidentiality concerns and which is more restrictive than the New York City Bar Association template incorporated into the Commercial Division rules. This Protective Order was entered by the Court on May 22, 2013. See Ex. C to Carroll Aff. The parties then exchanged discovery requests and document productions relating to insurance issues.

Shortly thereafter, the underlying settlement efforts began to take shape. At the NFL Parties' request, the Insurers agreed to stand down on further discovery efforts in the Coverage Action and did not return to Court until two and a half years later, on November 16, 2015 (after the Settlement of the MDL Action had been finalized *and* approved by the federal court). During the November 16, 2015 conference, Justice Oing determined that discovery should recommence and go "full speed ahead." See Carroll Aff., Ex. D at 24. At that time, the Court rejected the NFL Parties' concern that discovery in the Coverage Action could jeopardize its defense in the opt-out lawsuits, specifically stating that the Protective Order would adequately shield sensitive documents and that the Court would serve as the gatekeeper with respect to any third-party requests for such materials. See Carroll Aff., Ex. E at 5-6.

On May 11, 2016, and despite Justice Oing's express rejection of their arguments during the earlier conference, the NFL Parties filed a formal motion to stay this case for those same reasons. The Court's denial of the NFL Parties' motion was memorialized in a written Decision and Order entered on November 1, 2016. See Ex. F to Carroll Aff. The NFL Parties filed a

motion to stay the ruling pending appeal, which was denied by the Court. The NFL Parties next filed a notice of appeal to the Appellate Division, but did not prosecute it.

2. The Insurers' Efforts to Obtain Discovery

Following the Court's denial of the motion for a stay, and after more than four years since the commencement of this action, the parties finally began the discovery process in earnest. On February 1, 2017, the Insurers served their Second Omnibus Demand for Discovery and Inspection seeking documents and communications from the NFL Parties related to the MDL Action and the Settlement, which includes all non-public underlying litigation materials possessed by the NFL Parties and/or their attorneys such as defense counsels' evaluations of the NFL Parties' potential liability, the available defenses, and the reasonableness of the Settlement, and any communications related thereto. See Ex. G (Request No. 28, 29, 89 and 90). Specifically, Request Nos. 28, 29, 89 and 90 (the "Requests")⁴ demanded the following:

REQUEST NO. 28: All Documents and Communications relating to evaluation and settlement of the Head Trauma Litigation, including but not limited to evaluation of the NFL's and NFL Properties' potential liability (respectively) or the reasonableness of the Class Action Settlement and Communications with Your personnel, with Member Clubs, or with Persons with ownership interests in Member Clubs relating to the merits of the Class Action Settlement.

REQUEST NO. 29: All Documents and Communications relating to the Head Trauma Litigation or Class Action Settlement, including but not limited to: (a) All Communications between You (including Your attorneys) and any Claimant or Claimant's attorney; (b) All mediation statements or submissions by any party; (c) All written demands, offers or proposals made by You or the Claimants, and all Documents related to or discussing oral demands, offers, or proposals; (d) All proposals made by a mediator, and all Documents related to or discussing such proposals; (e) All Communications exchanged between You and any Insurer relating to the Class Action Settlement; (f) All drafts of the Class Action Settlement agreement; (g) All reports, affidavits, declarations, letters or other Documents authored by any of Your experts or consultants relating to the Class Action Settlement; (h) All reports, affidavits,

⁴ This is not the first time that the Insurers have sought discovery of underlying litigation materials in this case (in addition to their numerous requests based on the policies' cooperation clauses). See, e.g., the Insurers May 10, 2013 Frist Omnibus Demands for Discovery and Inspection to both of the NFL Parties, Carroll Aff., Exs. H (Request Nos. 11, 12, 28) and I (Request Nos. 11, 12, 30). The NFL Parties did not produce responsive documents at that time.

declarations, letters or other Documents authored by any the Claimants' or Objectors' experts or consultants in connection with the Class Action Settlement; (i) All Documents filed in support of or against preliminary approval or final approval of the Class Action Settlement; (j) All Documents filed in the Appeal; (k) All Communications between You (including Your attorneys) and any Person authorized to administer the Class Action Settlement or any Special Master appointed in connection with the Head Trauma Litigation or the Class Action Settlement; and (l) All Documents and Communications related to claims for compensation under the Class Action Settlement, including but not limited to all submitted claim forms and all records of payment.

REQUEST NO. 89: All Documents and Communications related to mock jury exercises, focus groups, surveys, or questionnaires undertaken by You in connection with the Head Trauma Litigation.

REQUEST NO. 90: All discovery served or exchanged in the Head Trauma Litigation, including but not limited to interrogatories, document requests, and requests for admission and all responses, document productions, subpoenas and any responses, and deposition transcripts.

See id.

On March 17, 2017, the NFL Parties served their Objections and Responses to the Second Omnibus Requests, and responded to Request Nos. 28, 29, 89, and 90 by asserting a litany of objections, including on the basis of relevancy and privilege. See Ex. J to Carroll Aff. The NFL Parties even included a "General Objection" to all of the Document Requests advising that they were "not undertaking to search for or produce documents generated after the underlying litigation was initiated on July 19, 2011, or documents that came into NFL's possession after July 19, 2011, unless specifically indicated otherwise." See id. at 4. In other words, the NFL Parties refused to produce any documents or communications created after July 19, 2011—the date upon which the first underlying lawsuit was filed—unless the NFL Parties *unilaterally* deemed such documents to be appropriate for disclosure.⁵

⁵ The NFL Parties also have not articulated why they use July 19, 2011 as a cutoff date in response to certain of the Insurers' Requests (*see* Request Nos. 31, 33-34, 45, 47-70, 72-80), while at other times using August 1, 2011 (*see* Request Nos. 42-44, 46, 71) or August 1, 2012 (*see* Request Nos. 24-26)

By letter dated May 31, 2017, the Insurers outlined various deficiencies in the NFL Parties' responses to the Requests, including that the NFL Parties had improperly refused to produce documents relating to their defense efforts and Settlement in the MDL Action and requested a "meet and confer" conference to attempt to resolve those issues. See Ex. K to Carroll Aff. Over the course of the next nine months, the parties engaged in extensive efforts to resolve discovery disputes via the exchange of numerous letters and several lengthy teleconferences, throughout which the NFL Parties maintained their blanket objections to the production of documents related to their defense in the MDL Action and the Settlement for which they are now seeking coverage. See Ex. K to Carroll Aff.

Throughout this process, the Insurers correspondingly maintained that "all reports, evaluations, recommendations, memos, research, correspondence, mock trial exercises, etc. that were prepared in connection with the [MDL Action]," as well as "non-public settlement and mediation related materials that were prepared and exchanged between the parties" are not privileged vis-à-vis the Insurers, would be adequately protected by the Protective Order, and must be produced. See Carroll Aff., Ex. K (Letter dated January 17, 2018).

More specifically, the Insurers have articulated to the NFL Parties on numerous occasions that the requested documents are discoverable because: (1) they are not privileged or otherwise protected with respect to the Insurers; (2) the NFL Parties have a contractual duty to cooperate with their Insurers by, among other things, providing underlying litigation documents and analysis requested by the Insurers; (3) several of the Insurers have paid millions of dollars in defense costs used to fund the preparation of these very materials; (4) the documents are necessary for the Insurers to evaluate the defense and settlement of the underlying claims and to present their case regarding the coverage issues in this action; (5) the disclosure of these

materials is fully protected by the extensive Protective Order already in place for this exact purpose; and (6) the NFL Parties have placed the reasonableness of their defense and the Settlement squarely at issue in this case by virtue of their affirmative claims *against* the Insurers such that the “at issue” doctrine mandates their disclosure. See, e.g., Carroll Aff., Exs. K and L.

Nonetheless, the NFL Parties continue to refuse to produce these material and necessary documents based upon contentions that the Requests are “improperly overbroad” in light of what they refer to as a “rich *public record* concerning the underlying lawsuits and settlement,” and because the Requests “improperly seek the production of protected materials.” See Carroll Aff., Ex. K (Letter of November 2, 2017) (emphasis added). Given the NFL Parties’ consistent and vigorous obsession with confidentiality of their documents (the NFL Parties, not coincidentally, did not produce or receive one document in discovery in the MDL Action), the Insurers reject the notion that the public news accounts are “rich” or that they constitute a proxy for real discovery. Regardless of the volume of publicly-available sources of information, the NFL Parties are not freed of their discovery obligations in this action. Moreover, the NFL Parties have an obligation to search for and produce *all* responsive documents from their own files and cannot simply instruct the insurers to rely on documents found in the public domain.

3. The NFL Parties’ Operative Claims

For frame of reference in considering this motion to compel, we provide a brief overview of the NFL Parties’ operative pleadings against the Insurers. By way of Second Amended Counterclaims and Cross-Claims, the NFL Parties assert the following causes of action against the Insurers:

Count I – Cause of Action for Breach of Contract as to the Duty to Defend

The NFL Parties allege that the “Duty to Defend Insurers” have breached their contractual duties to provide the NFL Parties with a complete defense in and against the underlying litigations.

Count II – Cause of Action for Declaratory Relief as to the Duty to Defend

The NFL Parties seek a declaration that certain of its primary insurers are obligated to fully defend the NFL Parties in and against the underlying litigations.

Count III – Cause of Action for Breach of the Duty to Indemnify the NFL Parties for the Settlement

The NFL Parties allege that certain Insurers have breached their contractual duties to indemnify them by refusing to pay costs and damages associated with the underlying litigations.

Count IV – Cause of Action for Declaratory Relief as to the Duty to Indemnify the NFL Parties for the Settlement and Any Other Settlement or Judgment in the Underlying Lawsuits

The NFL Parties seek a declaration as to the rights and obligations of the Insurers with respect to the indemnification of the NFL Parties for costs and damages incurred in connection with the underlying litigations.

Count V – Declaratory Relief as to Certain Insurers' Bad Faith Refusal to Consent to the Settlement⁶

The NFL Parties seek a declaration that certain of the Insurers breached their respective express and implied duties, including the duty of good faith and fair dealing, when the Insurers unjustifiably refused to consent to the Settlement.

See Carroll Aff., Ex. M at ¶¶70-100.

In connection with Count V, the NFL Parties allege that certain Insurers have acted “unjustifiably and in bad faith” in refusing to concede that the Settlement was reasonable as to the NFL, NFL Properties or both, notwithstanding the NFL Parties’ failure to produce defense counsel’s substantive assessment of the underlying claims against NFL or NFL Properties, or any other meaningful underlying defense materials. See Ex. M to Carroll Aff. Other Insurers have not conceded reasonableness, but do not raise lack of consent to settle as a defense to coverage.⁷

⁶ This claim is asserted against ACE, Century, Continental Casualty, Continental Insurance, Discover, Guarantee, North River, Bedivere, St. Paul, TIG, Travelers Casualty, Travelers Indemnity, Travelers Property, U.S. Fire and Westchester (certain insurers that were named in the Complaint but subsequently settled with the NFL Parties are not referenced herein).

⁷ In particular, Allstate, XL, American Guarantee, and Arrowood have agreed not to assert lack of consent to settlement as a defense to coverage.

III. ARGUMENT

A. THE UNDERLYING LITIGATION MATERIALS ARE RELEVANT AND DISCOVERABLE

Article 31 of the New York Civil Practice Law and Rules (“CPLR”) implements the strong policy of New York favoring disclosure of pre-trial evidence and instructs that “there shall be full disclosure of all evidence *material and necessary* in the prosecution *or* defense of an action.” CPLR § 3101(a) (emphasis added); see ACG Credit Co. II v. Hearst, 102 A.D.3d 817, 818, 958 N.Y.S.2d 463 (2d Dept. 2013); McMahon v. New York Organ Donor Network, 52 N.Y.S.3d 194, 196 (N.Y. Sup. 2017). The terms “material and necessary” are to be interpreted liberally, requiring disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” Allen v Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449 (1968).

The Court has broad discretion to determine whether the materials sought are “material and necessary.” Roman Catholic Church of the Good Shepherd v. Tempco Sys., 202 A.D.2d 257, (1st Dep’t 1994). The test is one of “usefulness and reason,” in that the party seeking disclosure need only “demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” Vyas v Campbell, 4 A.D.3d 417, 418, 771 N.Y.S.2d 375 (2d Dep’t 2004). To this end, “New York has long favored open and far-reaching pretrial discovery” in an effort to “substitute honesty and forthrightness for gamesmanship.” DiMichel v. S. Buffalo Ry. Co., 80 N.Y.2d 184, 193, 590 N.Y.S.2d 1 (1992). In the spirit of this rule, the Court of Appeals has stressed that “pretrial discovery is to be encouraged.” Hoenig v Westphal, 52 N.Y.2d 605, 608, 439 N.Y.S.2d 831 (1981).

Sections 3124 and 3126 of the CPLR empower the Court to compel a party to comply with discovery obligations that it has unlawfully avoided. Thus, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.” CPLR § 3124. Moreover, depending on the extent of unlawful behavior, the Court may, among other things, deem certain issues resolved, preclude the noncompliant party from asserting defenses, or dismiss the claim altogether. See CPLR § 3126. Applying this extremely broad discovery standard, there can be no doubt that the underlying litigation materials long-requested by the Insurers are “material and necessary” as they are relevant to the claims and defenses asserted by both the NFL Parties and the Insurers.

The Coverage Action involves the NFL Parties’ attempt to obtain insurance coverage for the MDL Action and the Settlement. The Insurers have numerous substantive defenses to coverage, for which the requested discovery is material and necessary. These include whether the alleged injuries compensated under the Settlement occurred during the Insurers’ policy periods, whether the NFL Parties expected or intended those injuries to occur, whether the NFL Parties had knowledge of loss in progress prior to any of the policy periods or failed to provide timely notice to the Insurers, among others. Any one (or combination) of those defenses could serve to preclude coverage under the policies.

Even assuming, *arguendo*, that coverage exists, the Insurers are only obligated to pay their respective shares of those defense costs that are reasonable and necessary and to indemnify the NFL Parties for settlements that are reasonable.⁸ George Muhlstock & Co. v. American

⁸ Apart from reasonableness, the documents sought by the Insurers bear on numerous other coverage defenses including but not limited to allocation of liability between the NFL and NFLP, the expected or intended defense, misrepresentation in the applications for insurance, prior knowledge/loss in progress, and late notice. Just as the

Home Assurance Co., 117 A.D.2d 117, 126 (1st Dept. 1986) (holding insurer “liable to the insured for the reasonable counsel fees and necessary expenses, as well as the cost of settlement, *unless the settlement is unreasonable or exorbitant*”) (emphasis added); In re Prudential Lines, Inc., 170 B.R. 222, 246 (S.D.N.Y. 1994) (explaining that “the insurer need not indemnify its insured for a settlement which is either unreasonable . . . or which covers losses not falling within the ambit of the policy” and permitting discovery to insurer to challenge the reasonableness of settlement); Societe Generale Energie Corp. v. New York Marine and General Insurance Company, 368 F. Supp. 2d 296 (S.D.N.Y. 2005).

In this case, the Insurers have been deprived of the opportunity to substantively evaluate the strength of the underlying plaintiffs’ claims, the viability of the NFL Parties’ defenses, and the reasonableness of the Settlement so as to properly develop their defenses because the NFL Parties have produced virtually nothing related to the defense and settlement of the MDL Action beyond publicly-filed materials. All of the materials sought by the Insurers through the Requests are “material and necessary” to the fair resolution of a number of core issues in the Coverage Action, including, but not limited to: (1) whether the NFL Parties were in possession of information reflecting historical knowledge of any risks of head trauma or efforts to conceal same from players and the public; (2) whether the NFL Parties are entitled to recover from the Insurers for payments made under the Settlement based upon numerous substantive defenses to coverage, including expected or intended injury, known loss/loss in progress, misrepresentation in policy applications or late notice, to name a few (see footnote 5, *supra*); (3) whether the NFL Parties are entitled to obtain reimbursement from certain Insurers for all of their defense costs paid in the MDL Action; (4) whether the Settlement was reasonable as to the NFL; (5) whether

documents are discoverable as to reasonableness, they are also important to these other defenses, and the arguments presented here with regard to reasonableness apply equally to the Insurers’ other coverage defenses.

the Settlement was reasonable as to NFL Properties; (6) whether, with respect to certain Insurers, the NFL Parties violated the voluntary payment, consent-to-settle or other policy provisions by entering into the Settlement without prior consent; and (7) whether certain Insurers acted in bad faith by declining consent to the Settlement.

Under the rules of discovery and New York law, the Insurers are entitled to obtain the requested underlying litigation materials, which will be afforded protection by the strict Protective Order already entered in this case. Therefore, the NFL Parties must be compelled to produce the requested materials.

B. THE UNDERLYING LITIGATION MATERIALS (INCLUDING THE NFL PARTIES' DEFENSE FILES) ARE NOT PRIVILEGED AS TO THE INSURERS

In addition to their meritless objection based upon lack of relevance, the NFL Parties object to the production of non-public underlying litigation materials, including defense counsel files, based upon the attorney-client privilege and work product immunity. The NFL Parties objected to producing any materials "generated after the underlying litigation was commenced on July 19, 2011, or documents that came into NFL's possession after July 19, 2011," unless specifically indicated otherwise in its responses. The NFL Parties' unilateral decision to produce only the publicly-filed documents related to the MDL Action and Settlement or a few other cherry-picked items from its files is in violation of their clear discovery obligations.

As explained below, the NFL Parties have both a contractual and statutory obligation to produce the requested underlying defense materials to the Insurers. Neither the attorney-client privilege nor work-product immunity may be used by an insured to keep concealed from its insurers relevant information from an underlying lawsuit. Insurers are within the group of persons among whom any such privilege extends. Moreover, even if one accepts (wrongly, the Insurers submit) that privilege was a valid basis upon which to refuse discovery here, the NFL

Parties have placed the defense and settlement documents “at issue” in this lawsuit by assertion of their claims against the Insurers. Therefore, the NFL Parties must produce the responsive documents without further delay.

1. The NFL Parties Are Contractually Bound To Provide Defense Materials To The Insurers

In addition to the NFL’s current discovery obligations in this action, the NFL Parties were (and are) contractually obligated under the insurance policies to cooperate with the Insurers during the investigation, defense, and settlement of claims asserted in the MDL Action and opt-out lawsuits. Each of the policies issued by the Insurers to the NFL Parties contains a provision generally requiring the NFL Parties to “cooperate with [the insurer] in the investigation, settlement, or defense of the claim or suit,” commonly referred to as the “cooperation clause.” The purpose of such clauses “is to permit the insurer to investigate the legitimacy of a claim.” Ashline v. Genesee Patrons Coop. Ins. Co., 224 A.D.2d 847, 849, 638 N.Y.S.2d 217, 219 (3d Dep’t 1996). Applying this clause, New York courts have recognized an insured’s unreasonable refusal to respond to an insurer’s request for materials relating to the underlying claim as a valid basis upon which an insurer may deny coverage. James & Charles Dimino Wholesale Seafood, Inc. v. Royal Ins. Co., 656 N.Y.S.2d 325, 326 (2d Dep’t 1997) (disclaimer is appropriate based on insured’s “unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents”); New York Cent. Mut. Fire Ins. Co. v. Rafailov, 840 N.Y.S.2d 358, 360 (2d Dept. 2007) (considering compliance with the cooperation clause where the insureds “engaged in an unreasonable and willful pattern of refusing to supply material and relevant documents”).

Their express contractual obligation notwithstanding, the NFL Parties have long refused to cooperate with the Insurers, including during the negotiation of the Settlement. The Insurers

repeatedly requested that the NFL Parties provide them with access to the underlying litigation materials at that time in order to independently determine the relative merits of the underlying claims and defenses, the basis for the Settlement, and whether the Settlement and its terms were, in fact, reasonable. The NFL Parties refused to provide the materials necessary to allow the Insurers to properly evaluate the MDL Action and Settlement. That refusal continues now in the litigation and discovery phase of this dispute. Under the express terms of the Insurers' policies, the NFL Parties are obligated to provide the Insurers with sufficient information and documents to evaluate the claims, defenses, and damages at issue. The NFL Parties should be ordered to comply with their policy obligations and produce the documents at issue.

2. The Materials Are Not Privileged As Respects The Insurers

Consistent with their past practices, and despite the Court's instruction (in 2015) to move "full speed ahead" with unfettered discovery, the NFL Parties' strategy of non-disclosure has carried over into the Coverage Action. Through discovery, the Insurers again requested the non-public underlying litigation materials that they needed access to years ago when the NFL Parties sought the Insurers' agreement to the Settlement and which are now necessary to Insurers' numerous defenses in this litigation. Yet again, the NFL Parties have refused to provide them, notwithstanding their discovery obligations and the Protective Order, based upon the assertion that the documents are protected by the attorney-client privilege and/or work product doctrine.

The privileges asserted by the NFL Parties do not apply here. A tripartite relationship exists between the Insurers, the NFL Parties, and Paul Weiss (or any other retained defense counsel) that is rooted in their common interest in the defense of the MDL Action. Under New York law, the common interest doctrine is not an "independent source of privilege or confidentiality," but is an "exception to the general rule that the presence of a third party

destroys any claim of privilege” where there is a common legal interest between the parties. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 625, 38 (2016); Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York, 284 F.R.D. 132, 139 (S.D.N.Y. July 3, 2012). Importantly, the common legal interest at issue need not be “total identity of interest.” ACE Sec. Corp. v. DB Structured Prod., Inc., 40 N.Y.S.3d 723, 734-35 (N.Y. Sup. Ct. 2016) (recognizing that “the privilege may exist despite an adversarial relationship between the two parties asserting it,” even where a future lawsuit between those parties is foreseeable).

New York courts (both state and federal) have recognized that: (1) the common interest doctrine applies between insurer and insured as to the defense and settlement of allegedly insured claims; and (2) as a result, an insured may not assert privilege as a basis for withholding production of documents from underlying litigations in a coverage action. See Royal Indem. Co. v. Salomon Smith Barney, Inc., 4 Misc. 3d 1006(A), 791 N.Y.S.2d 873, 2004 N.Y. Misc. LEXIS 1052 (N.Y. Sup. Ct. 2004) (otherwise privileged communications between insured and its defense counsel were subject to the common interest doctrine as between insured and insurer and, thus, discoverable by the insurer in coverage litigation to ascertain whether insured’s notice of claim was timely and for purposes of allocation); Maryland Cas. Co. v. W.R. Grace & Co. - Conn., No. 88 CIV. 2613 (SWK), 1994 WL 592267, at *6-7 (S.D.N.Y. Oct. 26, 1994) (affirming order of magistrate judge that insured produce materials relating to underlying claims to insurers pursuant to common interest doctrine in coverage litigation).

Likewise, courts throughout the country have found the attorney-client privilege and work product doctrines inapplicable to preclude disclosure of an insured’s underlying defense files to its insurers in a subsequent coverage action involving a variety of coverage issues. In

Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991), the insurers sought production in a coverage litigation of the insured's defense counsel's files regarding the underlying litigations and the insured withheld certain documents based upon the attorney-client and work product privileges. Id. at 187. In concluding that the insured could not properly withhold the underlying defense files, the Supreme Court of Illinois held that: (1) the insured's duty to cooperate rendered the attorney-client and work product privileges inapplicable; and (2) notwithstanding the duty to cooperate, such privileges were unavailable to the insured because of the common interest between the insurers and insureds in the underlying action. See id. at 327-31. Accordingly, the court ruled that "*underlying defense litigation documents . . . cannot be privileged from insurers who may bear the ultimate burden of payment.*" Id. at 336 (emphasis added).

Other courts have reached similar results. See Metro Wastewater Reclamation District v. U.S. Fire Ins. Co., 142 F.R.D. 471, 476 (D. Colo. 1992) (finding attorney-client privilege and work product doctrine inapplicable to prevent discovery of underlying defense documents in a subsequent coverage dispute to determine whether, to what extent, and at what point in time insured knew its sludge contained hazardous substances); EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18, 23 (D. Conn. 1992) ("[C]ommunications between an insured and its attorney connected with the defense of underlying litigation are normally not privileged vis-à-vis the insured carriers in subsequent litigation."); Indep. Petrochem Corp. v. Aetna Cas. & Sur. Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986) (explaining that communications between insured and defense attorney relating to underlying litigation are "normally not privileged vis-a-vis the insured's carriers" in subsequent coverage litigation, and holding that documents generated by insured in anticipation of underlying claims were generated in anticipation of minimizing

something of common interest to both companies and their liability insurers and, therefore, could not be withheld from insurers); Am. Auto. Ins. Co. v. J.P. Noonan Transp., Inc., 2000 WL 33171004, *7 (Mass. Super. Nov. 16, 2000) (concluding that insurer was entitled to disclosure of communications between its insured and underlying defense counsel); In re Prudential Lines, 170 B.R. 222, 246 (S.D.N.Y. 1994) (“I hold, therefore, that American Club is entitled to discovery sufficient to explore whether the settled losses fall within the scope of the policies’ coverage, whether the settlements are reasonable, and whether PLI was potentially liable to each of the claimants.”).

Here, the NFL Parties have no valid basis to withhold production of the non-public underlying litigation materials from the Insurers. Even though the interests of the Insurers and the NFL Parties are adverse in the context of this Coverage Action, the law does not permit the NFL Parties to rely upon the attorney-client privilege or work product doctrine to prevent their Insurers from obtaining relevant discovery in this case. The Insurers have no other source of the information necessary to evaluate the defenses to the underlying lawsuits and the reasonableness of the NFL Parties’ Settlement and defense efforts in the MDL Action, among other issues, than through Paul Weiss’s research, investigation materials, analyses of the NFL Parties’ potential liability exposure and any related communications. Moreover, as emphasized by Justice Oing in denying the NFL Parties’ motion to stay discovery, the Protective Order will protect against disclosure of materials to third parties where appropriate. Accordingly, the NFL Parties should be compelled to produce the requested underlying litigation materials subject to the Protective Order in this Coverage Action, as they are relevant and not privileged with respect to any of the Insurers.

C. THE NFL PARTIES MUST DISCLOSE THE REQUESTED UNDERLYING LITIGATION MATERIALS PURSUANT TO THE “AT ISSUE” DOCTRINE

Alternatively, even if the requested underlying litigation materials are subject to the attorney-client privilege and/or the work product doctrine with respect to the Insurers (which they are not), these materials must be produced to the Insurers based upon New York’s well-established “at issue” doctrine. The NFL Parties have placed the sufficiency of their underlying defense efforts, their evaluation of their potential liability in the Underlying Lawsuits, and the reasonableness of the Settlement squarely at issue by suing the Insurers for what may ultimately exceed \$1.4 billion in defense and indemnity costs.

More specifically, in asserting that the decision to enter into the Settlement was reasonable, and that certain of the Insurers have acted in bad faith for refusing to consent to the Settlement, the NFL Parties have rendered these materials indispensable to the claims and defenses at issue in this case. The Insurers cannot meaningfully respond to the claim that the Settlement was reasonable as to NFL and/or NFL Properties without discovery of all materials evidencing defense counsel’s and the NFL Parties’ evaluation of the underlying claims (and available defenses) and all related communications.

“Under the ‘at issue’ doctrine, where a party places legal advice or other privileged facts or communications at issue, it is deemed to have waived the privilege with respect to such facts or communications and can be compelled to produce them.” American Re-Ins. Co. v. United States Fid. & Guar. Co., 40 A.D.3d 386, 492 (1st Dep’t 2007). “[T]he attorney-client privilege *and* the work product doctrine can be deemed to be waived where a party advances claims or defenses that place protected information ‘at issue’ that is, ‘where invasion of the privilege is required to determine the validity of the client’s claim or defense and application of the privilege would deprive the adversary of vital information.’” Royal, 2004 N.Y. Misc. LEXIS 1052, *24-

25; American Re-Ins., 40 A.D.3d at 492. As particularly relevant to this case, the doctrine “reflects the principle that privilege is a shield and must not be used as a sword.” American Re-Ins., 40 A.D.3d at 492.

Whether a party has waived privileges is determined based on the following factors:

- (i) whether the assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (ii) whether through this affirmative act the asserting party put the protected information in issue by making it relevant to the case; and (iii) whether application of the privilege would deny the opposing party access to information vital to his defense.

Bd. of Managers v. 13th & 14th St. Realty, LLC, 2013 NY Slip Op 31218, ¶ 14 (Sup. Ct. June 5, 2013); see also DH Holdings Corp. v. Marconi Corp. PLC, 2005 NY Slip Op 25450, ¶ 2, 10 Misc. 3d 530, 533, 809 N.Y.S.2d 404, 406 (Sup. Ct. Oct. 24, 2005). New York courts applying the above factors have specifically found that privileged materials regarding the defense of an underlying litigation must be produced in a subsequent insurance coverage action where the insurer requesting those documents cannot reasonably defend itself against the claims for insurance coverage asserted against it without the allegedly privileged documents. See, e.g., Royal, 2004 N.Y. Misc. LEXIS 1052.

In Royal, a critical coverage issue turned on the timeliness of the insured’s notice to an excess carrier that an underlying claim would potentially implicate its policy. In support of its claim, the insured relied upon certain facts to establish when its defense counsel (coincidentally Paul Weiss) perceived exposure implicating the excess coverage but, at the same time, claimed privilege over the underlying defense file. Royal, 2004 N.Y. Slip Op 50739(U), at 1. In granting the insurers’ motion to compel, the Royal court held:

[The insured] cannot establish that they provided timely notice to Royal while at the same time refusing to disclose the information that would either prove or disprove that threshold assertion ... [The insurers] also have a substantial need

for the withheld “assessment” materials, since the allegedly “privileged” “work product” records relate to central issues in the case such as late notice and settlement-fund-allocation, as well as the reasonableness of the settlements. Moreover, *[the insurers] cannot obtain the substantial equivalent of these materials without undue hardship*.

Id. at 9-10 (citations omitted) (emphasis added).

Similarly, in DH Holdings, the court determined that the plaintiffs/indemnitees had waived their right to assert privilege over defense materials with respect to an underlying case for which they were seeking indemnification (for defense costs and a settlement payment) from the defendants because, just as in this case, key issues included: (1) whether the underlying settlement was reasonable; and (2) whether plaintiffs’ underlying attorneys’ fees were reasonable. 10 Misc. 3d at 531. The court accepted the defendants’ arguments that plaintiffs had “put the issues of reasonableness of settlement and necessity of legal fees at issue by filing the current lawsuit” and that without discovery from the underlying litigation “it [was] virtually impossible for Defendants to investigate the reasonableness of plaintiffs’ actions, the settlement amount, the decision to settle and/or the amount of legal fees expended” (Id. at 532), and rejected the plaintiffs’ contention that the privileged documents were not necessary because reasonableness of the settlement could be assessed based on certain already-available evidence. Granting defendants’ motion to compel, the court elaborated as follows:

The heart of this matter is to determine if the settlement was appropriate, and, if so, was it reasonable; inquires that, of necessity, place these documents at issue.

It is insufficient to respond, as plaintiffs have done, that the rationale for the settlement, and its reasonableness, can be tested by the testimony of [plaintiff’s] vice-president, without the privileged documents. Nor is the testimony of [plaintiffs’ patent litigation] attorney sufficient. *This testimony, as to reasonableness and necessity, should be scrutinized through the lens of relevant, contemporaneous documents prepared in connection with, and to accomplish, the settlement of the [patent litigation]. It seems to me that the plaintiffs cannot on the one hand seek indemnification for the settlement and costs, and on the other hand refuse to produce the documentary record leading to such settlement.*

Id. at 535 (emphasis added).

The Royal and DH Holdings courts have answered the question of whether an insured (or purported indemnitee) can withhold documents based on the assertion of privilege while, at the same time, bearing the burden to establish a condition to obtaining insurance coverage or contractual indemnification based on the substance of those same documents that are being withheld. They cannot. And neither can the NFL Parties here.

To obtain coverage, the NFL Parties each bear the burden to establish that amounts paid under the Settlement relate to bodily injury claims covered under the Insurers' policies and that the decision to enter into the uncapped Settlement through which each is obligated to pay amounts anticipated to exceed \$1 billion, made without substantively litigating the merits of even a single one of the underlying claims (or conducting any discovery), was reasonable.⁹ Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 218 (2002); In Re Prudential Lines, 170 B.R. at 246. The Insurers require access to all of the requested underlying litigation materials in order to understand, as to each defendant, the strength of the underlying claims and defenses, to evaluate the basis for the underlying Settlement, and to defend against the NFL Parties' claim that they owe coverage or acted unreasonably in refusing to consent to the Settlement. Thus, there can be no question that the requested underlying litigation materials speak directly to the reasonableness of the Settlement and the scope of potential coverage under the Insurers' policies.

For all of these reasons, even if the requested underlying litigation materials are otherwise privileged as to the Insurers (which they are not), New York's "at issue" doctrine

⁹ The success of other high-profile professional sports organizations in vigorously defending against similar head trauma claims merits noting. See, e.g., In re: National Hockey League Players' Concussion Injury Litigation, No. 14-md-02551 (D. Minn. July 13, 2018) (denying plaintiffs' motion for class certification in MDL action against NHL); McCullough v. World Wrestling Entertainment, Inc., No. 15-cv-01074, Doc. 116 & 374 (D. Conn.) (granting WWE's motions to dismiss and for SJ); Mehr v. Federation Internationale de Football Association et al, Case No. 14-cv-3879 (N.D. Cal. July 16, 2015) (granting motions to dismiss filed by professional and youth soccer leagues).

requires their disclosure in this case. The NFL Parties cannot simultaneously seek to establish coverage for the Settlement and defense costs while refusing to produce the substantive documentary record that forms the basis for their claims. The NFL Parties' suggestion that the determination of whether the Insurers owe upwards of \$1 billion in coverage for the underlying lawsuits should be based almost exclusively upon the documents available to the general public—rather than from the files of the NFL Parties and their defense counsel—is absurd. Accordingly, the requested underlying litigation materials must be disclosed to the Insurers to allow a fair opportunity to defend against the NFL Parties' claims.¹⁰

IV. CONCLUSION

New York's broad discovery standard encourages (and indeed, expects) the disclosure of all relevant documents and information during the pretrial discovery stage. Despite this standard, the NFL Parties have persisted in their pattern of non-disclosure for many years by improperly refusing to produce some of the most probative material in this Coverage Action.

As set forth herein, the requested underlying litigation documents are material and necessary to the resolution of core issues in this case, including those which the NFL Parties have injected into this litigation and bear the burden of proving. The Insurers must have access to these requested materials – for which certain of the Insurers already have been billed for and paid millions of dollars – in order to prove their cases and meaningfully defend against the claims asserted by the NFL Parties.

¹⁰ The Insurers anticipate that, in response to this motion, the NFL Parties may reference various non-litigation confidentiality agreements entered into with the Insurers (except Westport) prior to the commencement of the Coverage Action in order to facilitate the exchange of sensitive information regarding the underlying claims. The Insurers understand that these agreements will be the subject of a separate motion to be filed by the NFL Parties. The Insurers submit that these pre-litigation agreements neither relieve the NFL Parties of their discovery obligations in this litigation nor lessen the proper scope of discovery in any way, but will respond more fully to the NFL Parties' arguments once set forth in briefing.

Moreover, even to the extent that the materials are deemed to be privileged, the “at issue” doctrine mandates their disclosure in this case, and adequate protection from third-party disclosure is provided by the terms of the comprehensive Protective Order entered by the Court. Therefore, the Insurers respectfully request that the NFL Parties be compelled to produce the underlying litigation and settlement materials requested by the Insurers.

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New York, New York

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